IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO. 894 OF 2005

Mohd Athar Nizamuddin .. Appellant

vs

1.Mohd Ahmed Khan & ors .. Respondents

Mr.V.Y.Sanglikar for Appellant

Mr. H.V.Holmagi for Respondents

CORAM : B.H.MARLAPALLE, J

DATE: 28th September, 2005

P.C.

1. Heard learned counsel for the appellant who has filed Special Civil Suit No.2194 of 2005 and Notice of Motion No.2001 of 2005 filed in the said suit came to be dismissed by the learned Judge of the City Civil Court vide his order dated 31st August 2005 and hence this appeal.

2. In the said Notice of Motion initially the learned Judge of the trial court had rejected the

prayer for ad interim relief and therefore the plaintiff had filed A.O.No.679 of 2005 which was disposed of on 15th July, 2005 with a direction to decide the pending Notice of Motion No. 2001 of 2005 which came to be heard and decided on 31st August,2005 and in the meanwhile status quo in respect of the suit property as on 15th July 2005 was directed to be maintained by the parties. Accordingly, Notice of Motion was heard and decided by the impugned order.

3. The only issue that was required to be considered by the trial Court was regarding the prima facie finding in possession and if there was material available to show that the plaintiff was in possession of the suit land as at present the Notice of Motion would succeed. The trial Court on assessing the documents on record and the averments made by the respective parties has come to the conclusion that the plaintiff failed to make out a prima facie case to show that he was in possession of the suit property.

4. As per the plaintiff, the suit land admeasures about 15 gunthas and part of survey no. 117, Hissa

No.18 C.T.S,. No.3390 of village Malavani Taluka Borivali came to be transferred to him along with the defendant no.16 in terms of the agreement for sale dated 10th October, 1991 and the vendors were the defendant no.1 and the predecessor of defendant nos. 2 to 11. There is no dispute that the said vendors were not the owners of the suit land and the suit land was owned by Mrs Mandakini Chavan and others. It is claimed that on 9th May, 1990 the original land owners signed an agreement for sale with the plaintiff's vendors and therefore the plaintiff's vendors had a title to transfer the suit land in favour of the plaintiff and defendant no.16. In such circumstances, the plaintiff was required to first prima facie show that the original owners had put in possession, the suit land of his vendors and thus the plaintiff obtained possession from them of the suit land. There is nothing to show that even prima facie that the original owners i.e Mrs Mandakini Chavan and others had transferred possession of the suit land to the vendors of the plaintiff. A copy of the agreement for sale dated 9th May 1990 is placed on record and it does not show that possession of the suit property was handed over to the purchasers/second

party on signing of the said agreement. The plaintiff places reliance only on this agreement in support of his contentions that his vendors were put in possession of the suit property and this cannot be accepted more so when Mrs Mandakini Chavan and other owners are not a party to the agreement for sale dated 10th October, 1991.

5. In the earlier round i.e in another Special Civil Suit No.3973 of 1997 the plaintiff had approached the Court for a declaration and injunction alongwith Notice of Motion No.3588 of 1997. By an order dated 3rd January, 1998 the Notice of Motion was dismissed and the learned advocate for the plaintiff sought permission to withdraw the suit with liberty to file a substantial suit for specific performance of the agreement of sale dated 10th October, 1991 and for consequential reliefs. The suit was allowed to be withdrawn with liberty as prayed. S.C.Suit No.2194 of 2005 has not been filed for specific performance of the agreement and in fact it is filed for a declaration and permanent injunction. The defendant nos. 12 to 15 claimed that they purchased the suit land from the original owners

i.e. Mrs Mandakini Cnhavan and others by a registered sale deed dated 10th November, 2004 and consequently they were put in possession of the suit land. The trial Court noted that though the plaintiff claimed to have paid Rs.2,25,000/- on signing the agreement for sale dated 10th October, 1991 there was no conveyance concluded in favour of the plaintiff and at the instance of the original land owners. The record further shows that the title of the plaintiff's vendors over the suit land was doubtful. The Commissioner's report dated 26th May 2005 has also been considered by the trial Court and though it has been discarded for some other reasons, a perusal of the said report does not make out a specific case that the plaintiff was put in possession of the suit land. The report has recorded the contentions of the plaintiff and the defendant no. 14 as made out during the Commissioner's visit to the suit land.

6. In the premises, the view taken by the trial Court in refusing to grant injunction in favour of the plaintiff cannot be termed as illegal or perverse. Hence, this appeal fails at the threshold and the same is dismissed in limine.

(B.H.Marlapalle, J)